Mead Nursing Home, Inc. and General Teamsters, Deliverymen and Helpers Local Union No. 564, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Petitioner. Case 6-RC-9081

December 16, 1982

## DECISION AND DIRECTION OF SECOND ELECTION

## By Chairman Van De Water and Members Fanning and Zimmerman

Pursuant to authority granted it by the National Labor Relations Board under Section 3(b) of the National Labor Relations Act, as amended, a three-member panel has considered the objections to an election held on September 18, 1981, and the Regional Director's report recommending disposition of same. The Board has reviewed the record in light of the exceptions and brief, and hereby adopts the Regional Director's findings and recommendations.

In affirming the Regional Director's findings and recommendations, we find that the Employer's statement, set forth in Objection 4, constitutes a threat of discharge and a threat not to reinstate employees in the event of a strike. Objection 4 alleges that the Employer misstated the law in campaign literature sent to all of its employees. One of the topics in the six-page "fact sheet" concerned the following:

Question: Can I lose my job if the Union calls me out on strike?

Answer: If the Union calls you out on strike to try to force Mead Nursing Home to agree to union promises, Mead Nursing Home is free to replace economic strikers. This means that when the strike is over, you may no longer have a job, and the law does not force Mead Nursing Home to rehire you.

We cannot agree with our dissenting colleague that this statement is "wholly acceptable." To "rehire" a person implies that the employment relationship had been completely severed when actually it is "on hold" in a strike situation. Striking employees

<sup>1</sup> The election was conducted pursuant to a Stipulation for Certification Upon Consent Election. The tally was 29 for, and 46 against, the Petitioner; there were 3 challenged ballots, an insufficient number to affect the results. retain the right to be reinstated upon making an unconditional offer to return and to be placed on a preferential hiring list if positions are not available at the time of the offer.3 Although an employer which informs its employees that they are subject to replacement during an economic strike need not give a legal seminar on the panoply of residual rights which attach to striking employees,4 it may not explicitly or implicitly threaten to terminate unilaterally the employment relationship because of a strike. The Employer here went beyond a mere announcement of its right to replace striking employees and elaborated on what the phrase "to replace economic strikers" meant. This elaboration, through the conjunctive use of the term "rehire" and the phrase "you may no longer have a job," implicitly threatened to sever permanently the employment relationship. In so stating, the Employer implied that it was within its sole discretion, under color of law, to terminate its employment relationship with strikers, thereby terminating all rights to reinstatement.<sup>5</sup> Such an inference constitutes a threat, for it invariably creates a deep and lasting negative impression on employees, heavily dependent on their jobs, that to exercise their right to strike would be tantamount to signing their own "pink slip." In these circumstances, we find that such a misstatement of Section 7 rights has a coercive impact on employee participation in protected concerted activity and constitutes an impermissible threat to the right of employees to engage in protected concerted activity.

Objection 5 concerns a letter the Employer sent to all employees 3 days before the election. The purpose of the letter was to outline for the employees what they could gain or lose should the Union be voted in. Under the heading, "What can you lose?", the letter states:

Most important of all, you could lose the right to speak and think for yourself. If a union is certified, you will have to deal through Union representatives and may not be permitted to go

<sup>&</sup>lt;sup>3</sup> In light of the Board's recent ruling in Midland National Life Insurance Ca, 263 NLRB 127 (1982), Member Zimmerman, in sustaining Objection 4, does not rely upon a finding that the statement constitutes a material misrepresentation. Rather, he finds that the statement constitutes an impermissible threat. Member Fanning, adhering to the sound principles of Hollywood Ceramics Company, Inc., 140 NLRB 221 (1962), and General Knit of California, 239 NLRB 619 (1978), would find the Employer's statement constitutes both an objectionable misrepresentation and an impermissible threat.

<sup>&</sup>lt;sup>a</sup> See *The Laidlaw Corporation*, 171 NLRB 1366, 1369-70 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970), for a full discussion of economic strikers' employment rights.

<sup>&</sup>lt;sup>4</sup> Eagle Comptronics, Inc., 263 NLRB 515 (1982). Member Fanning, who was not on the panel which decided Eagle Comptronics, does not agree with the principle reached in that case that an employer which taunts employees with the spectre of permanent strike replacements is not obligated to outline the residual rights attaching to economic strikers. Member Fanning would find it objectionable for an employer to set forth to employees selective facts and legal principles where such selectivity serves to mislead and threaten employees regarding their rights under the Act. In any event, Member Fanning finds Eagle Comptronics distinguishable from the instant case.

<sup>&</sup>lt;sup>8</sup> Edward A. Utlaut Foundation, Inc. d/b/a Edward A. Utlaut Memorial Hospital and Fair Oaks Nursing Home, 249 NLRB 1153, 1157, fn. 7 (1980); George Webel d/b/a Webel Feed Mills & Pike Transit Company, 217 NLRB 815 (1975).

directly to Mead Nursing Home about particular problems that you may have.

The Regional Director rightly found the foregoing statement<sup>6</sup> to constitute a retaliatory threat<sup>7</sup> to terminate unilaterally an existing benefit of employees to deal directly with the Employer if the Union were selected.

Our dissenting colleague is guilty of minimizing the employee rights afforded under the Act and overemphasizing the limitations in his attempt to excuse the Employer's thinly veiled attempt to threaten employees with the loss of their right to deal directly with management. Section 9(a) of the Act affirmatively clarifies that individual employees retain the right to present their grievances to management without union intervention, absent inconsistent terms of a collective-bargaining agreement. The Employer transformed this limited exception into a general rule in declaring that "[i]f a union is certified, you will have to deal through Union representatives and may not be permitted to go directly to Mead Nursing Home . . . . " (Emphasis supplied.)

The Board has stated that "while an employer may explain that with Union representation the Union will be a participant in employer-employee relations generally, an employer cannot threaten to retaliate against its employees' selection of a union representative by cutting off the employees' Section 9(a) right to deal directly with management."8 Here, the Employer made just such a threat. Accordingly, we sustain Objection 5.

[Direction of Second Election omitted from publication.]9

## CHAIRMAN VAN DE WATER, dissenting:

I disagree with the majority that Objections 4 and 5 constitute grounds for setting aside the election. Contrary to my colleagues, I would not find statements of fact to be objectionable unless there are grounds, and I can find none here, for concluding that the statements in question are implicitly threatening.

With respect to Objection 4, the Regional Director found that the Employer sent literature to all employees on September 3, 1981, which contained six pages of questions and answers about the up-

<sup>6</sup> Member Fanning would find that this statement also constitutes an objectionable misrepresentation.

coming election on August 26. Among those questions and answers was the following:

QUESTION: Can I lose my job if the Union calls me out on strike?

ANSWER: If the Union calls you out on strike to try to force Mead Nursing Home to agree to union promises, Mead Nursing Home is free to replace economic strikers. This means that when the strike is over, you may no longer have a job, and the law does not force Mead Nursing Home to rehire you.

According to the Petitioner, the statement, "the law does not force Mead Nursing Home to rehire you," was objectionable because it misstated the reinstatement rights of economic strikers as set forth in The Laidlaw Corporation. 10 The Regional Director agreed, citing Edward A. Utlaut Foundation. Inc., d/b/a Edward A. Utlaut Memorial Hospital and Fair Oaks Nursing Home. 11 In that case, the Board adopted an Administrative Law Judge's finding that a statement almost identical to the one quoted above misstated the law, as it conveyed the message that the employer had no duty to rehire employees who were replaced during an economic strike. 12 My colleagues in the majority agree with the Regional Director that the Employer's statement constitutes grounds for setting aside the election. They concur with the view that the statement constituted a misstatement of law. Relying further on Utlaut, they also find that the statement was a threat to discharge employees and to refuse to reinstate them in the event of a strike.

Read in a vacuum, the Employer's statement, "the law does not require Mead Nursing Home to rehire you," may be seen as a questionable representation of employees' *Laidlaw* rights. Considered in context, however, this phrase merely reads as

<sup>&</sup>lt;sup>1</sup> Associated Roofing & Sheet Metal Co., Inc., 255 NLRB 1349 (1981).
<sup>8</sup> Greensboro News Company, 257 NLRB 701 (1981). See Associated Roofing & Sheet Metal Co., Inc., 255 NLRB 1349 (1981); Dick Seidler Enerprises d/b/a Jose & Dodie's Tawern, 254 NLRB 401 (1981); Ducane Heating Corporation, 254 NLRB 112 (1981); Armstrong Cork Company, 250 NLRB 1282 (1980); and Tipton Electric Company and Professional Furniture Company, 242 NLRB 202 (1979), affd. 621 F.2d 890 (8th Cir. 1980).

<sup>9 [</sup>Excelsior footnote omitted from publication.]

<sup>10 171</sup> NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970). See N.L.R.B. v. Fleetwood Trailers Inc., 398 U.S. 375 (1967). In Laidlaw (at 1369-70) the Board held that:

<sup>[</sup>E]conomic strikers who unconditionally apply for reinstatement at a time when their positions are filled by permanent replacements: (1) remain employees; and (2) are entitled to full reinstatement upon the departure of replacements unless they have in the meantime acquired regular and substantially equivalent employment, or the employer can sustain his burden of proof that the failure to offer full reinstatement was for legitimate and substantial business reasons.

<sup>11 249</sup> NLRB 1153, 1157-58 (1980).

<sup>&</sup>lt;sup>12</sup> In Utlaut, supra, the statement the Board found objectionable also appeared in a question-and-answer format. The statement in that case was as follows:

QUESTION: While we are on strike who will care for the patients and residents?

Answer: We would have to depend on anyone we could get. Under the law, if the Union makes you strike to try to force the hospital-nursing home to agree to the Union's demands, the hospital-nursing home is free to replace the strikers. This means that after the strike is over, you may no longer have a job, and the law does not force the hospital-nursing home to rehire you. [249 NLRB at 1157, fn. 7.]

one part of a perfectly accurate and wholly acceptable statement concerning the Employer's right to replace economic strikers. At the beginning of its answer, the Employer explained that it would be free to hire replacements in the event employees engaged in an economic strike. Since employers are under no obligation to terminate permanent replacements at the end of such a strike, the Employer proceeded to make it clear that the strikers conceivably could have no job to return to when the strike was over, if they had been replaced. Finally, the Employer warned employees that "the law does not require Mead Nursing Home to rehire you." This phrase, read in conjunction with the Employer's preceding explanation, simply meant that the Employer could lawfully refuse to reinstate employees it had replaced during the strike.

From the plain language of the Employer's answer, it is evident that its focus was limited strictly to the time frame represented by a hypothetical strike, followed by a period in which permanent replacements occupied the strikers' former jobs. There is nothing to indicate that the Employer was referring to a period in which the strikers' jobs would be vacant. Thus, I see no basis for inferring that the Employer erroneously stated that the law would never force it to rehire the strikers it had replaced or that the strikers' jobs would necessarily be lost *forever* once their positions had been filled.13 To the contrary, the answer in its entirety conveyed nothing more than a simple, straightforward message that an employee who strikes can legally be replaced, and that not even the law can help such an employee so long as his or her replacement remains on the job. This, of course, is an accurate statement of the law. In this regard, the Board has held that truthfully informing employees that they are subject to permanent replacement in the event of an economic strike does not constitute impermissible threats under Section 8(a)(1), or objectionable conduct in an election. 14

In my view, the worst that possibly can be said about the Employer's statement is that it was incomplete, in that it failed to describe the circumstances in which strikers would be entitled to reinstatement. To find that it was inaccurate, however, and, moreover, to find that it constituted a threat, creates objectionable conduct out of whole cloth. While it is true that the Employer's answer did not

delineate the full panoply of rights due economic strikers under the Act, it is also true that the Board has never imposed an affirmative duty on employers to give legal seminars on this topic once they broach the subject by warning employees about the legitimate risks involved in striking. Indeed, in Eagle Comptronics, Inc., 15 the Board has made it clear that there is no basis for imposing on employers a duty of this magnitude. Similarly, the Board has never imposed on union representatives, who explain to employees that they have a right to strike, an obligation to add the caveat that employees who exercise this right can be permanently replaced. Inasmuch as the failure to exhaust a subject is not the equivalent of misstating it,16 I would overrule Objection 4.17

Objection 5 alleges that the Employer sent a letter to all employees on September 15, 1981, which, in the course of explaining what employees stood to gain or lose from union representation, misstated the rights of employees to present grievances directly to management as set forth in Section 9(a) of the Act. The letter stated, in pertinent part, as follows:

Most important of all, you could lose the right to speak and think for yourself. If a union is certified, you will have to deal through union representatives and may not be permitted to go directly to Mead Nursing Home about particular problems that you may have.

The majority adopts the Regional Director's finding that Objection 5 was meritorious. Member Fanning does so because, in his opinion, the statement regarding the employees' obligation to deal through union representatives constituted a misstatement of law as well as a threat to terminate existing benefits. Member Zimmerman, on the other hand, finds it objectionable only on the basis of the Regional Director's finding that the statement constituted a threat. Again I must dissent from my colleagues' insistence on finding misstatements and threats in circumstances which clearly do not warrant such findings.

Section 9(a) provides as follows:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect

<sup>&</sup>lt;sup>13</sup> Compare *Piezo Technology, Inc.*, 253 NLRB 900 (1980), in which the employer warned that employees could be replaced if they struck, and once a person went on their job that they "are no longer employees of this Company," and *Dayton Food Fair Stores, Inc.*, 165 NLRB 1420 (1967), enfd. 399 F.2d 153, 154 (6th Cir. 1968), cert. denied 393 U.S. 1085 (1969), in which the employer told its employees that, under the law, economic strikers "can be fired at once and permanently replaced."

<sup>&</sup>lt;sup>14</sup> Eagle Comptronics, Inc., 263 NLRB 515 (1982); Mississippi Extended Care Center, Inc., d/b/a Care Inn, Collierville, 202 NLRB 1065 (1973).

<sup>15</sup> Supra.

<sup>16</sup> See Eagle Comptronics, supra.

<sup>&</sup>lt;sup>17</sup> The employer's statement in *Utlaut*, in my opinion, was similarly unobjectionable. Accordingly, I find that the issue in that case was wrongly decided.

to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment

Under this section of the Act, employees may continue to present grievances directly to the employer, without union intervention, only if such a grievance practice is not inconsistent with the terms of the existing collective-bargaining agreement. Union representation may, therefore, in certain instances, preclude direct employee access to management. In accordance with the above, the

Employer's statement merely explained to employees that, in the event of unionization, they "may" not be permitted to take "particular" problems directly to the Company. It did not state that the opportunity to do so would be completely foreclosed.

Far from constituting a threat, I find the statement in question to be entirely consistent with the law, <sup>18</sup> and a fair and reasonable exercise of campaign rhetoric. Accordingly, I would overrule Objection 5. <sup>19</sup> As I find no merit in the Petitioner's objections, I would certify the results of the election.

<sup>&</sup>lt;sup>18</sup> See Virgin Islands Spinning Corporation, 194 NLRB 885, 886 (1972).
<sup>19</sup> The Employer's statement was not made in the context of any unfair labor practices. Further, there have been no findings, other than those previously discussed with respect to Objection 4, that the Employer made any statements expressly or implicitly threatening employees with reprisals for electing the Union. In these circumstances, I find it extremely difficult to comprehend totally the "metamorphic" reasoning process the majority has used to transform an otherwise plain statement of fact into a basis for setting aside an election.